No. 298

In the

Supreme Court of the United States

OCTOBER TERM, 1969

HERBERT M. ROSENTHAL and
DUNBAR BUILDERS CORPORATION,

Petitioners,

vs.

HARRY A. ASH, Trustee, MARSHALL M. HOLLEB, Nominee, and H. R. WEISSBERG CORPORATION, Debtor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEONARD GESAS
JOSEPH H. SCHWARTZ
MALCOLM M. GAYNOR
ROBERT DUNN GLICK
Attorneys for Respondents
Harry A. Ash, Trustee in
Bankruptcy and
H. R. Weissburg Corporation,
Debtor

MALCOLM M. GAYNOR
SCHWARTZ, COOPER & KOLB
33 North LaSalle Street
Chicago, Illinois 60602

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions Below	2
Question Presented	2
Statements of the Case	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

COURT DECISIONS

Smith v. Save-Rite Drug Stores, 178 F. 2d 507 (10th Cir. 1949)	6
In re Webcor, Inc., 392 F. 2d 893 (7th Cir. 1968), cert. den., 393 U.S. 837	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 298

HERBERT M. ROSENTHAL and
DUNBAR BUILDERS CORPORATION,

Petitioners,

vs.

HARRY A. ASH, Trustee, MARSHALL M. HOLLEB, Nominee, and H. R. WEISSBERG CORPORATION, Debtor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Harry A. Ash, Trustee in Bankruptcy, and H. R. Weissberg Corporation, debtor, pray that this Court decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 4 and 25, 1969.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported. They appear in the petitioners' appendix, pp. 32-48. A petition re rehearing *en banc* was filed and denied on May 20, 1969. Also on May 20, 1969, Judges Fairchild and Cummings issued an additional *per curiam* opinion with Judge Swygert again dissenting. The supplemental opinion and dissent is unreported to date and appears in the petitioners' appendix pp. 49-51.

The trial court announced its decision on December 17, 1968, and followed that decision by a written order and memorandum confirming the sale on January 15, 1969. The decision and the written order appears in the petitioners' appendix at pp. 1-6 and pp. 7-31.

QUESTION PRESENTED

May a district court allow a successful bidder to clarify its bid after a judicial sale and prior to confirmation?

STATEMENT OF THE CASE

The petitioners state that "no questions of fact are involved" (petitioners' Brief in Support of Petition for a Writ of Certiorari, p. 7). Petitioners' statement is not true.

The only issues in this case were questions of fact which have already been resolved against the petitioners by both the District Court and the Court of Appeals. The factual background is well stated in the majority opinion of the United States Court of Appeals for the Seventh Circuit of April 25, 1969 (petitioners' appendix p. 32). In the interest of brevity we shall include only a summary of those facts.

This matter involves a judicial sale during a Chapter X reorganization proceeding. The debtor, H. R. Weissberg Corporation, owned several hotels, including the Edgewater Beach Hotel in Chicago, Illinois (hereinafter referred to as "Edgewater property"). There were secured claims against the Edgewater property as follows:

First mortgage	$1,834,488.
Second mortgage	3,995.062.
Pension fund	364,585.
Furniture security agreement	135,000.
Mechanics liens	116,951.
Taxes established as of 8/1/68	250,000.
Total	$6,696,086.

Including accrued interest, such claims totaled approximately $7,000,000. (petitioners' appendix p. 12). Further, the property had been damaged by fire and the trustee had brought action against the insurer in which the trustee claimed in excess of $350,000. (petitioners' appendix p. 11). The insurer offered approximately $72,000. in settlement. In September, 1968 the trustee received an offer of $100,000 for his equity if the trustee kept the insurance claim and $200,000. if buyer acquired it. The buyer would also indemnify the trustee from certain substantial lienholders' claims for deficiencies. The trustee concluded and the District Court decided that a sale of the Edgewater property, other than pursuant to a plan or reorganization was proper. No one has challenged this conclusion nor the underlying evaluation of circumstances. The District Court ordered a sale on October 9, 1968. The sale was widely advertised and bidding took place in open court. There was no bid for the property free and clear of encumbrances. The highest bid received was $410,000. for the equity, with the buyer

receiving the insurance claim, but without the buyer's agreement to indemnify. The District Court rejected all bids and authorized the trustee to sell at public or private sale, subject to court approval.

The trustee elected to invite sealed bids, to be opened at a hearing before the Court November 22, 1968. Counsel for the trustee announced that after he opened and read the bids there would be a recess, after which a further and final bid could be made, followed by evaluation of the bids.

During the course of the transactions referred to, from September 6 to November 22, 1968, the bids were for the trustee's equity in the property, except for one bid (Rosenthal and Dunbar) for the property free and clear of encumbrances. Though the trustee had requested prospective purchasers to make their bids on a uniform basis, some of the bids for the equity contemplated that the purchaser would receive the fire insurance claim, but some did not. Some of the bids for the equity included an agreement by the bidder to indemnify the estate from claims for deficiency on behalf of holders of encumbrances. Trustee's counsel had indicated that the indemnity agreement had significant value to the estate.

Four bidders submitted bids on November 22, 1968: Marshall Holleb, Harold Shlensky, Rosenthal-Dunbar, and Dino D'Angelo. D'Angelo withdrew his bid at the hearings on confirmation. The Rosenthal-Dunbar and D'Angelo bids were inferior to the other two bids received. Holleb's November 22, 1968 bid was better than Shlensky's.

The District Court approved and ordered the trustee to accept the Holleb bid. As presented after the recess on November 22, 1968, it was an offer of $800,000. for the trustee's equity, and included an agreement to indem-

nify. With respect to the insurance claim, it was in the alternative: the trustee could keep the insurance claim, or could transfer it to Holleb at a price to be mutually agreed upon. On November 22, 1968 no one objected to the form of the Holleb offer.

On November 27, 1968, Holleb agreed to a $200,000 figure for the insurance claim. This however was merely a filling in of his November 22, 1968 alternative offer.

On December 6, 1968, Shlensky attempted to change his November 22, 1968 offer by permitting the trustee to keep the insurance claim, giving an agreement to indemnify, and increasing his deposit.

On December 11, 1968, the trustee's attorney, at the request of the Court, asked each bidder to state the use it intended to make of the property and to give evidence of the bidder's ability to perform on approval of the bid. Holleb was the only bidder who replied. His letter named the architects who had been engaged, the intended usage of the property and his ability to perform.

After the hearing, at which the District Court announced its decision to approve the Holleb bid, detailed findings, conclusions and an order were filed (petitioners' appendix pp. 7-23). An appeal was taken by Harold Shlensky and H. M. Rosenthal and Dunbar Builders Corporation to the Court of Appeals for the Seventh Circuit. On appeal, the Court of Appeals for the Seventh Circuit affirmed, Judge Swygert dissenting (petitioners' appendix pp. 32-48). Rehearing *en banc* was denied on May 20, 1969, Judge Swygert dissenting (petitioners' appendix pp. 49-51).

ARGUMENT

The petitioners have sought to distort the facts of this case in order to create an imagined conflict between the Seventh and the Tenth Circuit on the subject of the finality of judicial sales. Put bluntly, there is no conflict between the decision in the instant case rendered by the Court of Appeals for the Seventh Circuit and the decision relied upon by the petitioners rendered by the Tenth Circuit in *Smith* v. *Save-Rite Drug Stores,* 178 F.2d 507 (10th Cir., 1949).

The Court of Appeals in *Smith* v. *Save-Rite Drug Stores,* supra, was confronted with a situation where a district court had permitted ". . . an unsuccessful bidder at [a] trustee's sale to submit a higher bid while the matter was pending for confirmation without first denying the petition for confirmation of the sale [to a higher bidder]." (*Smith* v. *Save-Rite Drug Stores,* supra, at p. 509). The Tenth Circuit ruled that "A practice of permitting an *unsuccessful* bidder at a public auction, through sealed bids, after the amount of the highest and best bid at the auction has been disclosed, to submit a second bid when the matter comes on for confirmation of the sale, would tend to destroy the efficacy of auctions through sealed bids" (*Smith* v. *Save-Rite Drug Stores;* supra, at p. 510). [Emphasis added.]

The Court of Appeals for the Seventh Circuit expressly adopted the Tenth Circuit rule and concept of finality in this case (petitioners' appendix pp. 37-38). The Court of Appeals for the Seventh Circuit pointed out that the communications of the successful bidder, Holleb, subsequent to November 22, 1968, could reasonably be deemed to be

really a clarification of Holleb's November 22, 1968 bid so that Holleb's bid as supplemented could be considered consistent with the concept of finality. Mr. Shlensky's December bid was considered by both the Court of Appeals and the District Court to be a new bid and so the District Court could not consider Mr. Shlensky's December bid without undermining the concept of finality (petitioners' appendix p. 37). The Court of Appeals noted that "the policy of giving great weight to observing the finality of the bidding day has long been recognized" and discussed at some length the propriety and necessity for the rule which has been ". . . adopted by the great majority of American courts" (petitioners' appendix p. 38). Thus the decisions of the United States District Court of the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit in this case show, upon their face, that they are not only consistent with the Tenth Circuit's enunciation of the principle involved but indeed are identical to the Tenth Circuit position. There is no conflict whatsoever between the Tenth Circuit and the Seventh Circuit.

The petitioners, unsuccessful bidders, seek to disturb the finality of the sale so as to enable them to submit a second bid. Thus the result desired by the petitioners is in direct conflict with the holdings of both the Seventh and the Tenth Circuit. In order to twist the factual situation so as to make it appear that the United States District Court for the Northern District of Illinois and the United States Court of Appeals of the Seventh Circuit had permitted and sanctioned a bidder to change its bid after sale had become final, the petitioners refer throughout its statement of facts and its argument to Holleb as a "low bidder" or simply as a "bidder". The important fact, as found by both the District Court and the Court

of Appeals, is that Holleb was the successful bidder as of the final bidding date, November 22, 1968. The trustee announced on November 22, 1968, that "This is the final bidding hour as far as the trustee is concerned, unless the court will direct otherwise" (tr. Nov. 22, 1968, p. 50). The District Court recognized this and said, "I think the position I understand the trustee to have taken is that as far as the trustee is concerned he is finished with asking for bids" (tr. Nov. 22, 1968, p. 67). The District Court expressly found that "The designation by the Trustee in this regard of the 5:00 P.M. hearing on November 22, 1968, as being the final time and date of submission of bids should and does control herein. The SHLENSKY bid as made at 5:00 P.M. on November 22, 1968 is less than the HOLLEB bid of that date considering the evaluation of the insurance claim of $200,000., as reserved by HOLLEB in his bid on that date" (petitioners' appendix p. 16).

The District Court then stated that "The undertaking of December 2, 1968, of HOLLEB, in which he agrees to pay the insurance adjuster, is merely a clarification of the insurance claim net evaluation, and the undertaking with respect to the claims secured by hotel furnishings merely reiterates the HOLLEB agreement stated in open court on October 9, 1968, the first hearing on return of bids" (petitioners' appendix p. 17).

This case involves nothing more and nothing less than an unsuccessful bidder's attempt to reopen bidding after a sale had become final. There was no fraud, mistake, inadequacy or other such infirmity that would justify setting aside or otherwise disturbing the confirmation of the sale. As stated in *In re Webcor*, 392 F.2d 893, 899 (7th Cir. 1968), cert. den., 393 U.S. 837, "If parties are

to be encouraged to bid at judicial sales, there must be stability in such sales and a time come when a fair bid is accepted and the proceedings are ended. . . . Once the sale of the assets . . . [are confirmed] the existence of fraud, mistake or a like infirmity would be necessary to set that confirmed sale aside."

The fact that the District Court in rendering its decision to confirm the sale noted that only the successful bidder had answered the court's request that the court be informed of the intended usage of the Edgewater property and evidence ability to perform forthwith upon approval of a bid, is not evidence of fraud, mistake, inadequacy or other such infirmity as would support setting aside or otherwise disturbing the confirmation of the sale.

The Court's statement that the successful bidder's use of the purchased property was laudable, was obviously a mere afterthought and is, as the Court of Appeals for the Seventh Circuit stated, "a make weight" and "did not exceed proper bounds" (petitioners' appendix p. 39).

Petitioners have failed to show that there is a genuine conflict between the circuits on any question of bankruptcy law and no other substantial basis has been shown by the petitioners in their request that this Court issue a writ of certiorari to the United States Court of Appeals of the Seventh Circuit.

CONCLUSION

The petitioners were unsuccessful bidders at an open, public, judicial sale. The mere fact that the District Court allowed the successful bidder to clarify his bid before confirmation does not amount to an abuse of discretion on the part of the District Court, nor is there present any question of fraud, mistake or a like infirmity.

The District Court's statements to the effect that the successful bidder's intended use of the purchased property was, in the Court's opinion, laudable, was a mere afterthought and as the Court of Appeals of the Seventh Circuit observed, a "make weight" which did not exceed proper bounds (petitioners' appendix p. 39). The District Court, in this case, successfully insured that the highest bid from a financially responsible bidder was received consistent with the doctrine of finality.

The Court of Appeals affirmed the judgment of the District Court and in doing so expressly adopted the doctrine of finality of bidding of the Tenth Circuit. There is no conflict between the Seventh and the Tenth Circuits on the subject matter before this Court and there is no need or reason for this Court to issue a writ of certiorari in this case.

Respectfully submitted,

LEONARD GESAS
JOSEPH H. SCHWARTZ
MALCOLM M. GAYNOR
ROBERT DUNN GLICK
Attorneys for Respondents
Harry A. Ash, Trustee in
Bankruptcy and
H. W. Weissburg Corporation,
Debtor

MALCOLM M. GAYNOR
SCHWARTZ, COOPER & KOLB
33 North LaSalle Street
Chicago, Illinois 60602
RAndolph 6-0845